Ngiao Jong Nian v Lee Chan Foo & Anor

HIGH COURT (ALOR STAR) — CIVIL APPEAL NO 12–146 OF 2008
ZAMANI A RAHIM JC
26 AUGUST 2009

Evidence — Expert evidence — Trial judge expressing preference for first defendant's expert's testimony — Whether appellate court should interfere with trial judge's crucial finding that first defendant's expert was more credible

Tort — Negligence — Professional negligence — Medical practitioner — Whether lack of care in treatment and management of plaintiff — Whether first defendant had necessary consent to perform subtotal cholecytectomy — Whether there was failure to warn plaintiff of risks of surgery — Whether plaintiff proven that he had suffered harm as a result of first defendant's wrongful acts or omissions

On 30 May 2003, the plaintiff visited the Putra Medical Centre ('the second defendant') complaining of severe abdominal pain. He was seen by the first defendant, who diagnosed the plaintiff to be suffering from acute cholecystisis, which is an inflammation of the gall bladder. Upon the first defendant's advice the plaintiff consented to undergo a procedure referred to as a laparoscopic cholecytectomy, which involved the removal of the gall bladder through keyhole surgery. However, during the procedure the first defendant converted the keyhole surgery to an open surgery and carried out a subtotal cholecytectomy, wherein a part of the gall bladder was left behind. On 5 June 2003 upon the plaintiff's request one Dr TJ Wong ('Dr Wong'), from another hospital, carried out a re-exploration and removed the remaining part of the gall bladder that was left behind. In his written report Dr Wong had stated that he found some bile leaking from a linen ligature tied across the remaining part of the gall bladder and bilious fluid in the plaintiff's abdomen. The plaintiff commenced a medical negligence action against the defendants in the sessions court. It was the plaintiff's contention that the first defendant had been negligent in the manner in which he had treated and managed the plaintiff and he claimed general and special damages against the first defendant for the negligence. The facts of the case were largely dependent on the expert evidence that was offered by both the plaintiff and the first defendant. The trial judge found the first defendant's expert's testimony to be more credible and better supported by medical literature. Essentially the first defendant's expert confirmed that an open subtotal cholecytectomy was an acceptable practice and a safer option in the plaintiff's case. He also testified that the presence of bilous fluid in the plaintiff's abdomen was an accepted and expected

complication. In addition it was the expert's opinion that the second operation that the plaintiff underwent was not required because adequate time had not been given for the plaintiff's condition to improve after the first surgery. In the circumstances the sessions court held that the plaintiff had failed to prove his case against the defendants on a balance of probabilities. This was the plaintiff's appeal against that decision. In his appeal the plaintiff submitted, inter alia, that the first defendant did not have the necessary consent to perform the subtotal cholecytectomy; that the first defendant failed to inform the plaintiff of the risk of bile leakage in a subtotal cholecytectomy; and that the trial judge failed to consider the documentary evidence confirming the presence of the linen ligature tied across the remaining part of the gall bladder and the presence of the bilous fluid. In reply the first defendant submitted that the plaintiff had voluntarily signed the consent form which stated very clearly that he consented to an operation known as a laparoscopic cholecytectomy and to any further or other necessary procedures.

Held, dismissing the plaintiff's claim with costs:

(1) In this case the plaintiff knew that he was going in for a gall bladder operation and had consented to the removal of the gall bladder and any other operations deemed necessary when he voluntarily signed the consent form that stated to this effect. In any event if the plaintiff alleged that a doctor had operated without consent, then the proper cause of action to raise would be battery or trespass to the person and not negligence as was pleaded in this case (see paras 21 & 25–26).

(2) Although the first defendant had initially advised the plaintiff to undergo a laparoscopic cholecytectomy for the removal of the gall bladder, he testified that during the course of the surgery he had to carry out a partial removal or a subtotal cholecytectomy, as this was the safer option. His decision to carry out a partial removal instead of a total removal of the gall bladder was supported by the first defendant's expert. In any case, a subtotal cholecytectomy still involved the removal of the gall bladder, to which the first defendant already had the consent to perform. The first defendant's actions were medically justified, since the evidence showed that the subtotal cholecytectomy was in the interest of the plaintiff, to protect him from bile duct injury. Thus the plaintiff had not proven that there were any adverse complications from the first defendant's decision to carry out the subtotal cholecytectomy (see paras 17(a), 21–22 & 29).

(3) In the instant case, no evidence was led to suggest that the plaintiff would not have agreed to the operation carried out if he were warned of the risk of a subtotal cholecytectomy and any complications thereof. As such, the plaintiff had not satisfied the court that there was any consequence to the allegations of failure to warn (see para 31).

(4) The trial judge formed the view that the first defendant's expert was more credible, having personally heard and seen him during the course of the trial, and this is a crucial finding that the appeal court ought not to disturb. Further the medical literature tendered in evidence clearly did not support the plaintiff expert's view. In any case the on-table-cholangiogram ('OTC') in this case was carried out according to standard and accepted procedure to ensure that there was no injury and no blockage and there was no credible medical testimony that an OTC would only be carried out if the surgeon had done something wrong (see paras 13, 37 & 39).

(5) In order to succeed in his claim, the plaintiff had to prove that he had suffered harm as a result of the first defendant's wrongful acts or omissions. Although there was bile leakage, which was an accepted complication from the partial removal of the plaintiff's gall bladder, this had not caused bile peritonitis because the symptoms of such a condition were not present. Thus, the presence of bilous fluid alone did not mean that the plaintiff had suffered harm or injury. In fact, the evidence presented before the trial court did not support the claim that the plaintiff had been harmed. It is trite that without harm the final element of the alleged tort was not satisfied and that the plaintiff's claim had failed (see paras 43–45 & 52).

[Bahasa Malaysia summary

Pada 30 Mei 2003, plaintif ke Pusat Rawatan Putra ('defendan kedua') kerana kesakitan yang amat sangat pada bahagian abdomen. Dia dirawat oleh defendan pertama, yang mendiagnoskan plaintif mengalami akut kolesistitis, iaitu radang pundi hempedu. Atas nasihat defendan pertama, plaintif bersetuju menjalani prosedur yang dikatakan laparokolesistotomi yang melibatkan pembuangan pundi hempedu menerusi pembedahan lubang kunci. Tetapi, semasa prosedur tersebut defendan pertama menukarkan pembedahan *keyhole* kepada pembedahan terbuka dan melakukan sub-total cholecytectomy, di mana sebahagian pundi hempedu ditinggalkan. Pada 5 Jun 2003, atas permintaan plaintif, Dr TJ Wong ('Dr Wong'), dari hospital lain, menjalankan pemeriksaan semula dan membuang sisa pundi hempedu yang ditinggalkan. Dalam laporan bertulisnya, Dr Wong menyatakan bahawa dia menemui kebocoran hempedu daripada ligature linen yang diikat merentasi sebahagian pundi hempedu yang ditinggalkan dan cecair hempedu dalam abdomen plaintif. Plaintif memulakan tindakan kecuaian perubatan terhadap defendan-defendan di mahkamah sesyen. Adalah hujahan plaintif bahawa defendan pertama telah cuai dalam cara rawatannya dan menguruskan plaintif dan dia menuntut ganti rugi am dan khas terhadap defendan pertama atas kecuaian tersebut. Fakta-fakta kes sebahagian besarnya bergantung kepada keterangan pakar yang diberikan oleh plaintif dan defendan pertama. Hakim bicara memutuskan bahawa keterangan pakar defendan pertama lebih

dipercayai dan bagus disokong oleh maklumat perubatan. Pada dasarnya, pakar defendan pertama mengesahkan bahawa kolesistektomi sub-total terbuka adalah amalan yang terpakai dan pilihan yang lebih selamat dalam kes plaintif. Dia juga memberi keterangan bahawa kehadiran cecair hempedu dalam abdomen plaintif adalah komplikasi yang dijangka dan diterima. Tambahan lagi, adalah pendapat pakar bahawa pembedahan kedua yang dijalani plaintif tidak diperlukan disebabkan masa yang mencukupi tidak diberikan agar keadaan plaintif lebih baik setelah pembedahan pertama. Dalam keadaan itu, mahkamah sesyen memutuskan bahawa plaintif gagal membuktikan kesnya terhadap defendan-defendan atas imbangan kebarangkalian. Ini merupakan rayuan plaintif terhadap keputusan tersebut. Dalam rayuannya, plaintif menghujah, antara lain, bahawa defendan pertama tidak mempunyai kebenaran untuk menjalankan sub-total kolesistektomi; bahawa defendan pertama gagal memaklumkan plaintif risiko kebocoran hempedu dalam sub-total kolesistektomi; dan bahawa hakim bicara gagal mempertimbangkan keterangan dokumentar mengesahkan kehadiran ligatur linen diikat merentasi bahagian pundi hempedu yang masih ada dan juga kehadiran cecair hempedu. Sebagai balasan, defendan pertama berhujah bahawa plaintif menandatangani borang kebenaran dengan sukarela yang menyatakan dengan jelas bahawa dia bersetuju ke atas pembedahan yang dikenali sebagai laparoskopik kolesistektomi dan untuk prosedur lain yang perlu atau selanjutnya.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Dalam kes ini plaintif sedia maklum bahawa dia akan menjalani pembedahan pundi hempedu dan telah bersetuju untuk mengeluarkan pundi hempedu tersebut dan pembedahan lain yang dirasakan perlu apabila dia menandatangani borang persetujuan yang menyatakan perkara sedemikian. Walau apa pun, jika plaintif mendakwa bahawa seorang doktor telah membedahnya tanpa persetujuan, maka tindakan yang betul ialah serang sentuh atau ceroboh ke atas orang dan bukannya kecuaian seperti yang diplidkan dalam kes ini (lihat perenggan 21 & 25–26).

(2) Walaupun defendan pertama pada mulanya telah menasihati plaintif untuk menjalani laparoskopik kolesistektomi untuk mengeluarkan pundi hempedu, dia memberi keterangan bahawa semasa pembedahan tersebut, dia terpaksa menjalani pembuangan separuh atau sub-total kolesistektomi, kerana ini merupakan pilihan yang lebih selamat. Keputusannya menjalani pembuangan separuh dan bukannya pembuangan sepenuhnya pundi hempedu tersebut disokong oleh pakar defendan pertama. Dalam apa jua keadaan, kolesistektomi sub-total masih terlibat untuk membuang pundi hempedu, yang mana defendan pertama telah mendapat kebenaran untuk menjalankannya. Tindakan responden pertama adalah secara perubatannya wajar, kerana keterangan

menunjukkan bahawa kolesistektomi sub-total adalah untuk kepentingan plaintif, untuk melindunginya daripada kecederaan duktus hempedu. Oleh itu, plaintif tidak membuktikan bahawa terdapat komplikasi buruk akibat keputusan defendan pertama untuk menjalankan kolesistektomi sub-total (lihat perenggan 17(a), 21–22 & 29).

(3) Dalam kes ini, tiada keterangan menunjukkan bahawa plaintif akan tidak bersetuju ke atas pembedahan yang telah dilaksanakan jika dia diberitahu tentang risiko kolesistektomi sub-total dan sebarang komplikasi berkenaannya. Oleh itu, plaintif tidak memuaskan mahkamah bahawa terdapat kepentingan atas dakwaan-dakwaan kegagalan untuk memberi amaran (lihat perenggan 31).

(4) Hakim bicara membentuk pendapat bahawa saksi pakar defendan pertama lebih dipercayai, setelah mendengar dan melihatnya dalam perbicaraan, dan ini merupakan keputusan yang amat penting yang mana mahkamah rayuan tidak harus campuri. Malah, kepustakaan perubatan yang dikemukakan sebagai keterangan jelas tidak menyokong pandangan pakar plaintif. Apa-apa pun, kolangiogram (on-table-cholangiogram) ('OTC') dalam kes ini telah dijalankan menurut prosedur yang standard dan telah diterimapakai untuk memastikan bahawa tiada kecederaan dan tersumbat dan tiada keterangan perubatan kukuh bahawa OTC tersebut hanya boleh dijalankan jika pakar bedah telah melakukan kesilapan (lihat perenggan 13, 37 & 39).

(5) Untuk berjaya dalam tuntutannya, plaintif harus membuktikan bahawa dia telah mengalami kecederaan akibat daripada tindakan salah atau peninggalan defendan pertama. Walaupun hempedu bocor, yang mana merupakan komplikasi yang diterimapakai akibat daripada pembuangan sebahagian daripada pundi hempedu plaintif, yang mana tidak mengakibatkan radang hempedu kerana tanda-tanda keadaan tersebut tidak ada. Oleh itu, kewujudan cecair hempedu semata-mata tidak bermaksud bahawa plaintif mengalami kemudaratan atau kecederaan. Malah, keterangan yang dikemukakan ke hadapan mahkamah bicara tidak menyokong tuntutan bahawa plaintif telah dimudaratkan. Adalah menjadi undang-undang tetap bahawa tanpa kemudaratan, elemen terakhir tort yang didakwa tidak dipenuhi dan bahawa tuntutan plaintif telah gagal (lihat perenggan 43–45 & 52).]

Notes

For cases on expert evidence generally, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1526–1645.

For cases on negligence generally, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 712–1542.

Cases referred to

APV Hills & Mills (M) Sdn Bhd v AQ-Pacific Wide Sdn Bhd & Anor [2006] 3 MLJ 235, CA (refd)
Chatterton v Gerson and another [1981] QB 432, QBD (refd)
Clarke v Edinburgh Tramways Co 1919 SC (HL) 35, HL (refd)
Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593, FC (refd)
Golden Vale Gold Range & Country Club Sdn Bhd v Hong Huat Enterprise Sdn Bhd (Airport Autocentre Sdn Bhd & Anor, third party and another appeal) [2008] 4 MLJ 839, CA (refd)
Jone Theseira v Eileen Tan Ee Lian & Anor [2002] 4 MLJ 629, HC (refd)
Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] MLJ 87, HC (refd)
Teoh Chu Thong v Anantha Kiruisan PSR @ Anantha Krishnan & Anor [2008] 3 MLJ 559, CA (refd)
Udhaya Kumar a/l Karuppusamy & Anor v Penguasa Hospital Daerah Pontian & Ors [2004] 2 MLJ 661, HC (refd)
Zaheed bin Ahmad & Ors v Tham Poh Theng & Ors [2007] 6 MLJ 78, CA (refd)

C Megalai (Meg, Nacha, Zahir & Co) for the plaintiff/appellant.
Raja Eileen Soraya bt Raja Aman (Raja, Darryl & Loh) for the first defendant/respondent.
Mazlan Abdul Rahman (Abdul Halim Said & Co) for the second defendant/second respondent.

Zamani A Rahim JC:

INTRODUCTION

[1] This is an appeal by the appellant in a medical negligence action against the decision dismissing his claim against the first respondent and the second respondent.

[2] For ease of reference, the appellant shall be referred to as the plaintiff and the first respondent and the second respondent as the first defendant and the second defendant respectively.

[3] The plaintiff had commenced the action in the Sessions Court at Alor Star claiming for general and special damages against the first defendant in a medical negligence action.

BACKGROUND FACTS

[4] The plaintiff went to Putra Medical Centre, the second defendant on 30 May 2003 complaining of severe abdominal pain. The plaintiff was seen by the first defendant on 30 May 2003 and diagnosed with a condition referred to as

acute cholecystitis. Cholecystitis is essentially an inflammation of the gall bladder causing upper abdominal pain.

[5] At the first defendant's advice the plaintiff signed a consent form and underwent a procedure referred to as a laparoscopic cholecytectomy is the removal of the gall bladder through keyhole surgery.

[6] During the said procedure which was carried out on 31 May 2003, the first defendant converted the said keyhole surgery to an open surgery and carried out a subtotal chlocystectomy. A subtotal cholecystectomy is when some part of the gall bladder is left behind.

[7] On 5 June 2003, the plaintiff's care was transferred to another surgeon, Dr TJ Wong, SP1 at the plaintiff's request. SP1 had carried out a re-exploration and removed the balance of the gall bladder that was left behind. Following the re-exploration procedure, Dr TJ Wong, SP1 had written a report stating his findings as follows:

(i) Gall bladder 'remnant' about half of the gall bladder with a linen ligature tied across its body. Bile was leaking from this into the right subhepatic space.

(ii) 500 mls of bilous fluid in the peritoneal cavity.

[8] The plaintiff claimed that given these findings, the first defendant had been negligent in the manner in which he had treated and managed the plaintiff.

THE DEFENCE

[9] As the facts are substantially undisputed, the case is largely dependant on the expert evidence that was offered by both the plaintiff and the first defendant.

[10] In the main, the learned sessions court judge in arriving at his decision to dismiss the plaintiff's claim made the following findings and observations in the grounds of judgment:

(a) the plaintiff had failed to prove his case on a balance of probabilities;

(b) as regards the allegation of failure to fully inform the plaintiff of the procedure, based on the evidence before him the learned judge was of the view that the plaintiff had in fact been informed comprehensively in the Mandarin language;

(c) the plaintiff had in fact consented to the operation and to any further/other necessary procedures as he voluntarily signed the consent form;

(d) the plaintiff had failed to prove the allegation that the first defendant had misdiagnosed him as the plaintiff's expert had testified that the first defendant had reached a correct diagnosis of cholecystitis;

(e) on a finding of fact, the first defendant's expert's testimony was more credible and was further supported by medical literature;

(f) essentially the first defendant's expert had confirmed that an open subtotal cholecystectomy (the procedure performed by the first defendant) is an acceptable practice and was a safer option in the plaintiff's case;

(g) the presence of bilous fluid in the plaintiff's abdomen after a total cholecystectomy or subtotal cholecystectomy procedure is an accepted and expected complication;

(h) the second operation undergone by the plaintiff in another hospital was not required and moreover, adequate time was not given for the plaintiff's condition to improve; and

(i) the plaintiff had failed to prove the pain and suffering he had undergone as well as his loss of earnings.

THE ROLE OF THE APPELLATE COURT

[11] It is settled law that an appellate court should not readily interfere with the finding of facts of the court below which had the opportunity of hearing and seeing the witnesses: see *APV Hills & Mills (M) Sdn Bhd v AQ-Pacific Wide Sdn Bhd & Anor* [2006] 3 MLJ 235 (CA), *Zaheed bin Ahmad & Ors v Tham Poh Theng & Ors* [2007] 6 MLJ 78 (CA), *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87, *Golden Vale Gold Range & Country Club Sdn Bhd v Hong Huat Enterprise Sdn Bhd (Airport Autocentre Sdn Bhd & Anor, third party and another appeal)* [2008] 4 MLJ 839 (CA) and *Jone Theseira v Eileen Tan Ee Lian & Anor* [2002] 4 MLJ 629.

[12] This principle was clearly highlighted in the recent case of *Teoh Chu Thong v Anantha Kiruisan PSR @ Anantha Krishnan & Anor* [2008] 3 MLJ 559 with reference to the English case of *Clarke v Edinburgh Tramways Co* 1919 SC (HL) 35 at p 36 per Lord Shaw Dunfermline where it was said that:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on a balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not, I can of course quite understand a

A Court of Appeal that says it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another.

B **[13]** Here, the learned sessions court judge clearly found the first defendant's expert more credible, having personally heard and seen him during the course of the trial. This is a crucial finding which this court ought not to disturb such findings.

C ISSUES RAISED BY THE PLAINTIFF

[14] The plaintiff's counsel in her written submission dated 25 June 2009 has raised the following issues:

D (a) The first defendant did have the necessary consent to perform a subtotal cholecystectomy (pp 5–7 of the plaintiff's written submission).

(b) The first defendant failed to inform the plaintiff of the risk of bile leakage in a subtotal cholecystectomy (pp 8–9 of the plaintiff's written submission).

E (c) The expert evidence of the plaintiff should have been preferred (pp 9–17 of the plaintiff's written submission).

(d) The learned session court judge failed to consider the documentary evidence confirming the presence of linen ligature tied across the stump (pp 17–18 of the plaintiff's written submission).

F (e) The presence of bilous fluid was not explained (pp 18–21 of the plaintiff's written submission).

G **[15]** Now, I propose to deal with each of the issue in turn.

Consent for subtotal cholecystectomy

H **[16]** The finding by the learned sessions court judge was that the plaintiff had in fact consented to the operation and to any further or other necessary procedures as he voluntarily signed the consent form and that the first defendant had explained all that was required of him.

I **[17]** This finding of fact is supported by the evidence that was adduced in the court below:

(a) The plaintiff never disputed signing a form that says in Bahasa Melayu very clearly that the plaintiff had consented to an operation known as a 'laparascopic chlocystectomy'.

(b) All of the doctors who testified confirm that this meant that there would be a keyhole operation to remove the gall bladder.

(c) The plaintiff's wife who was with him during the consultation with the first defendant confirmed that the plaintiff had agreed to the operation on his gall bladder as can be seen from her evidence produced below:

> Defendan 1 kata ada batu dalam hempedu. Dia tanya *nak operation* semasa Plaintif di ward, saya ada bersama bila Dr Lee kata *nak operate* dia kata nak *operate*, dia kata sekarang sains sudah canggih, guna hisap keluar. (Emphasis added.)

When questioned by the second defendant's counsel the plaintiff's wife's evidence was as follows:

> Setujukah Plaintif bagi kebenaran kepada doktor untuk jalankan pembedahan.
>
> *Ya*. (Emphasis added.)

(d) Significantly, the consent form itself not only refers to the operation as follows:

> ... dengan ini memberi keizinan untuk menjalani *pembedahan* For Chole KIV Open Chole. (Emphasis added.)

But also states that:

> Saya juga memberi izin untuk sebarang langkah pembedahan selanjut atau yang lain sebagaimana yang didapati perlu bagi pembedahan tersebut di atas ...

[18] Counsel for the first defendant submitted that, to which I agreed, the court is not dealing with a mentally incapacitated person. The plaintiff is of sound mind and literate and must therefore be deemed to have understood what he had executed.

[19] It is to be noted that, although the plaintiff's counsel had attempted to argue in the court below that the plaintiff never consented to any operation at all, she seems now only argue that the plaintiff never consented to the operation known as a subtotal cholecystectomy.

[20] It has been adduced in evidence that partial removal of gall bladder is a recognised medical procedure known as a subtotal cholecystectomy and is done to protect the patient as in DW3's witness statement, D34 as follows:

> Sub-total cholecystectomy is a safe, straight forward and definitive operation in patients for whom standard cholecystectomy could be dangerous, and is a more attractive proposition than cholecystectomy.

[21] The plaintiff had agreed and consented to the removal of gall bladder and any other operations deemed necessary. A subtotal cholecystectomy is partial removal of the gall bladder.

[22] The first defendant's has testified that he had to carry out a partial removal as this was the safer option. His decision to carry out a partial removal instead of a total removal of the gall bladder is supported by the first defendant's expert as can be seen from the evidence below:

> Q: In your view do you think that the sub-total cholecystectomy carried out on the Plaintiff on 31.5.2003 was appropriate?
>
> A: I am of the view that because the 1st Defendant felt that it was a difficult situation and according to him he could not visualise the Calot's triangle, it was appropriate in those circumstances for him to have performed instead of risking bile duct injury.

(see Dr Manisekar's witness statement — answers to questions 21 and 22).

[23] There can be no question that the first defendant's medically justified and would have been captured by the consent given by the plaintiff.

[24] After all, as to whether a medical practitioner had the requisite consent to perform a particular procedure, the law states that the patient needs only be informed of the broad nature of the procedure. In the leading case of *Chatterton v Gerson and another* [1981] QB 432 had held that:

> Once the patient is informed on broad terms of the nature of the procedure which is intended, and gives her consent, that consent is real ... if information is witheld in bad faith, the consent will be vitiated by fraud. ... But it would be no defence to an action based on trespass to the person if no explanation had in fact been given. The consent would have been expressed in form only, not in reality.

[25] In this case, the plaintiff certainly knew that he was going for a gall bladder operation.

[26] In any event, it is now too late for the plaintiff to make a claim based on the lack of consent. If it is alleged that a doctor had operated without consent, then the proper cause of action to raise would be battery or trespass to the person and not negligence. Here, the plaintiff has erroneously pleaded his case in negligence and not trespass.

Explanation of risks

[27] The plaintiff's counsel argued that the plaintiff should have been warned that a subtotal may be performed and the complications must be told.

[28] The learned sessions court judge was apprised that the subtotal cholecystectomy was only decided during the course of the surgery when the first defendant had problems visualising the calot's triangle. It must be remembered that a subtotal cholecystectomy is in any event still be removal of the gall bladder, to which the first defendant already had consent to perform.

[29] Importantly, the plaintiff has not proven that there were any adverse complications of the decision to carry out the subtotal cholecystectomy. The evidence is that it was done in the interest of the plaintiff to protect him from bile duct injury.

[30] If the plaintiff is to succeed in this claim that there was a failure to warn of any risk, the plaintiff must be able to prove on a balance of probabilities that if such warning had been given the plaintiff would not have agreed to the operation and as such would have avoided any adverse complication that may have materialised (although none here). This principle is borne out in the case of *Chatterton* in the following passage:

> I should add that if I had thought that Dr Gerson had failed in his duty to inform her of the implications inherent in the second injection, I would not have been satisfied that if properly informed Ms Chatterson would have chosen not to have it. The whole picture on the evidence of a lady desperate for pain relief, who has just been advised by Mr Crymble to let Dr Gerson try again. When asked what she would have done she said that she would have refused because she knew her family was opposed to the second operation, because she knew how much it hurt and what it was like, and because she still had the pain and was beginning to learn to put up with it.

[31] In the instant case, no evidence was led to suggest that the plaintiff would not have agreed to the operation carried out if he were warned of the risk of a subtotal cholecystectomy and any complications thereof. As such, the plaintiff has not satisfied this court that there was any consequence to the allegations of failure to warn. Contrary to the inference made by the plaintiff's counsel, the Federal Court decision in *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593, does not say that a doctor must now explain all the risks and that if you do not, you are liable.

The plaintiff's expert evidence

[32] The learned sessions court judge clearly preferred the evidence of the first defendant's expert and found him more credible. Dr Wong, PW1 did not appear as the plaintiff's expert but was the surgeon who had performed a second surgery on the plaintiff. The plaintiff's expert was one Dr Suppiah a/l Muthiah, PW3 and the first defendant's expert was one Dr Manisekar a/l Subramaniam, DW3.

[33] It must be added that it was not surprising that the trial court had formed the view that the first defendant's expert was more credible as the plaintiff's expert had confidently testified during cross-examination, that a subtotal cholecystectomy is 'very ancient' and outdated and 'should't be done'.

[34] When he was confronted with various medical literature, as recent as 2007 which confirmed that an open subtotal cholecystectomy is a safer approach in certain circumstances: see *Medical Literature*, D32. The plaintiff's expert, however, continued to maintain his stand but offered no medical literature to back him up.

[35] Further it must be noted that the plaintiff's counsel has misquoted the article cited as MS1 at p 11 of the plaintiff's written submission. In the aforesaid submissions, the plaintiff's counsel stated that the article supports the plaintiff's expert's views on the method of treatment in that a patient with cholecystitis should be medicated first, before being operated on, based on the following excerpt:

> the conventional management of acute cholecyctitis has involved a conservative approach during the acute episode followed by a cholecystectomy 6 to 12 weeks later (interval cholecystectomy). This approach aimed to avoid a potentially more difficult cholocystectomy during the emergency admission.

[36] The plaintiff's counsel however omitted to cite the rest of the very same paragraph which reads as follows:

> These concerns and shortcoming supported also by recent experience *prompted a challenge to the 2-stage management approach*, and indeed several subsequent reports demonstrated the safety of an emergency open cholecystectomy. The benefits of the 1-stage management approach were confirmed in 3 randomised trials that showed that an open cholecystectomy performed within 7 days of onset of sysptoms was superior to the 2-stage management approach.

(Emphasis added.)

[37] The medical literature clearly does not support the plaintiff's expert's views that the plaintiff should have been merely medicated first as submitted.

[38] The plaintiff's counsel has submitted at length on why she is of the view that there were a 'multitude of discrepancies' in the evidence of the first defendant's expert and concentrated her submission in this regard on the evidence in relation to the on-table-cholangiogram ('OTC') in this case.

[39] With due respect, her arguments are difficult to follow. Suffice to say that the evidence that was produced and believed was that:

The OTC was carried out according to standard and accepted procedure to ensure that there was no injury and no blockage, and there was no credible medical testimony which suggested that an OTC would only be carried out if a surgeon had done something wrong.

The linen ligature

[40] Counsel for the plaintiff attacked the following finding by the learned sessions court judge:

> Pihak Plaintif telah membangkitkan isu penemuan 'a linen ligature tied across the remnant of the Plaintiff's gall bladder'. Pakar Plaintif mendakwa 'using a single ligature across the stump is risky because the ligature tends to cut through'. Sebenarnya tidak ada di dalam laporan SP 1 tentang isu ini malahan dia tidak pun ditanya tentang isu ini semasa dipanggil memberi keterangan.

[41] According to the plaintiff's counsel, the report marked as 'SP1' refers to linen ligature and therefore was not properly considered by the learned judge. There is, however, an omission to state the important fact that the report prepared by Dr Wong does not mention that the linen ligature had cut across the stump and that Dr Wong himself was not asked about this when he testified in court.

[42] The learned session court judge was quite right to make the observation and finding that he had done.

The presence of bilious fluid

[43] To succeed in his claim, the plaintiff must prove that he had suffered harm as a result of the first defendant's wrongful acts or omissions.

[44] The learned sessions court judge had found that the presence of bilious fluid in the plaintiff's abdomen after a subtotal cholecystectomy procedure is an accepted and expected complication and hence, would not in itself indicate something was amiss.

[45] It is trite that without harm, the final element of the alleged tort is not satisfied and the plaintiff's claim had properly failed. Based on the plaintiff's submission, the partial removal of the plaintiff's gall bladder had resulted in bile leakage which can cause bile peritonitis.

[46] However, the evidence presented before the trial court do not support the claim that the plaintiff had been harmed.

Bile leakage

[47] Based on the credible medical evidence adduced, the presence of bilious fluid alone does not mean that the plaintiff has suffered harm or injury. Even the plaintiff's expert confirms that there was no bile leakage that was coming out from a bile duct injury as evident below.

> Q: Do you agree no bile duct injury led to bile leakage?
>
> A: Not from duct, from stomach.
>
> A: Yes, no bile leakage from bile duct injury.
>
> (at p 46 of the notes of proceedings).

[48] The first defendant's expert explained as follows:

> If it is bile, it does not mean something is wrong, in this patient nothing was wrong, we expected it to leak.

[49] All the plaintiff managed to prove was that there was some amount of bile coming out from the stump that was left behind. The court was apprised by the first defendant's expert that this is an accepted complication — after all any part of the body is operated on, needs time to heal. This is why the practice is for the surgeons to put in a drain. They expect some bile leak or bilious fluid to be drained out. And also why the literature produced by the first defendant's expert makes reference to the following:

> A sub-hepatic drain was kept in all cases.

[50] The fact that there was some bilious fluid or bile leakage coming from the gall bladder stump alone as to ignore the credible medical opinion that has been put forward before the trial judge.

Bile peritonitis

[51] The theory of counsel for the plaintiff on this issue is set out at p 13 of the plaintiff's submission as follows:

> While agreeing that high pressure and fever are normal during the onset of bile peritonitis, and whilst agreeing that fever can be controlled with medication during hospital stay, and despite the 2nd Defendant's hospital records that show that the

> Plaintiff was sweating (possible due to medication to bring down the fever) and high pressure, Dr Mani went to great lengths to say that Plaintiff did not have any complications.

[52] There is sufficient evidence that confirms the plaintiff did not suffer from bile peritonitis. Dr TJ Wong, SP1 did not say so in his report. The signs and symptoms of the condition were not present. On the facts, the plaintiff was clearly free from bile peritonitis, contrary to the claim made by the counsel for the plaintiff.

CONCLUSION

[53] Given the learned trial judge's findings, the plaintiff clearly did not discharge his burden of proving on a balance of probabilities that the first defendant had committed any of the negligent acts complained of and that the injuries pleaded were caused by the said acts.

[54] Similarly, the plaintiff had also failed to prove the second defendant's negligent as pleaded in his claim. It was held in the case of *Udhaya Kumar a/l Karuppusamy & Anor v Penguasa Hospital Daerah Pontian & Ors* [2004] 2 MLJ 661 that:

> The onus was on the plaintiffs to show, on a balance of probabilities, that there was a causative link between the resultant damage and the negligent act of the defendants (*Wilsher v Essex Area Health Authority* [1988] 1 All ER 871) ...

[55] Based on the above grounds, I have no alternative but to dismiss the plaintiff's claim against the first defendant and the second defendant with costs.

Plaintiff's claim dismissed with costs.

Reported by Kohila Nesan